RECORD AND BRIEFS

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In the Supreme Court of the United States

JAMES W. ZIGLAR,

Petitioner,

v.

AHMER IQBAL ABBASI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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(Additional captions listed on inside cover)

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Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,

Respondents.

DENNIS HASTY AND JAMES SHERMAN,

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MISCELLANEOUS

Eric Lichtblau, *U.S. Hate Crimes Surge 6%, Fueled by Attacks on Muslims*, N.Y. Times (Nov. 14, 2016), http://tinyurl.com/NYTMuslimHateCrimes 2

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church-state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of church and state, Americans United has long fought to uphold the First Amendment and equal-protection guarantees that prohibit the government from favoring, disfavoring, or punishing based on one's beliefs with respect to religion.

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise and Establishment Clauses of the First Amendment forbid government conduct that singles out and discriminates against particular people based on their religion, a principle that has never been more important than it is today.

This case comes to the Court at a time when anti-Muslim sentiment is on the rise. Eric Lichtblau, *U.S. Hate Crimes Surge 6%, Fueled by Attacks on Muslims*, N.Y. Times (Nov. 14, 2016), http://tinyurl.com/NYTMuslimHateCrimes. Private discrimination and harassment are all too common. When, as here, that discrimination becomes government-sanctioned, government-sponsored oppression, it is all the more intolerable. Thus, not only is it critical that the victims of that oppression have the opportunity to seek judicial remedies for the injuries and indignities that they suffer at the government's hands, but it is paramount that this Court send a strong message that official disfavor and the meting out of punishment on the basis of religion are antithetical to our constitutional order.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents suffered horrific indignities. They were kept in solitary confinement, deprived of sleep, exposed to extreme temperatures, taunted, strip-searched, and shackled. Some were beaten to the point of broken bones. All of that occurred for no reason other than respondents' perceived religion and nationality. Petitioners now invite this Court to ex-

cuse these gross violations, contending that it was not clearly established that the government was forbidden to treat respondents in that manner. The Court should refuse petitioners' invitation.

The equal-protection component of the Due Process Clause and the Religion Clauses of the First Amendment prohibit the government from making invidious distinctions based on religion or belief. In protecting the fundamental right to religious liberty, "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Petitioners straightforwardly violated this strict constitutional prohibition by detaining and torturing respondents for months based on respondents' religion and national origin—even *after* respondents were determined to be no threat whatever to anyone. Doubling down on this invidious distinction and contending that general concerns for national security justified their mistreatment of respondents—again, even after they knew that respondents were not a danger—petitioners now contend that they did not violate any clearly established law.

But it is well settled that the government is prohibited from doling out punishment based on religion. And it is equally established that government cannot officially disfavor any particular religious group or denomination. Petitioners did both.

In analyzing whether petitioners violated the equal-protection component of the Due Process Clause by punishing respondents based on their religion and national origin, the Court should not ignore clearly established law under the other constitutional clauses that speak with the same voice to prohibit the extreme conduct here. To do so would not advance the purposes of qualified immunity but instead would cause doctrinal confusion and create perverse incentives for future deprivations of fundamental rights.

STATEMENT

After the attacks of 9/11, the U.S. Department of Justice initiated a "massive investigation." J.A. 43. As part of that investigation, respondents—men of Middle-Eastern descent who are, or were perceived to be, Arab Muslims—were arrested for mostly trivial immigration violations. Pet. App. 2a n.1, 4a. They were held in solitary confinement for months "even though they were unquestionably never involved in terrorist activity" (*id.* at 2a), and their detentions continued even after they were cleared of any conceivable wrongdoing.

1. The Investigation: The post-9/11 investigation that resulted in the roundup of Arab Muslims involved officials at the highest levels of government, including former Attorney General John Ashcroft and former FBI Director Robert Mueller. Pet. App. 8a. Petitioner Ashcroft directed federal law-enforcement agencies to use "every available law enforcement tool" to find and capture possible terrorists. J.A. 43. Petitioner Mueller directed the FBI to investigate every one of the 96,000 tips that the Bureau received in the week following the 9/11 attacks,

no matter how implausible the tips might be. Pet. App. 8a-9a.

The investigation "had a significant immigration law component." J.A. 60. Ashcroft and Mueller instituted and implemented a broad policy that focused on immigration violations, "'whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation * * * and discovered to be a non-citizen who had violated the terms of his visa, was arrested.'" Pet. App. 8a (quoting Compl. ¶ 1). Ashcroft issued a stern warning: "If you over-stay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible." J.A. 60.

The resulting protracted detentions were, apparently, not enough for Ashcroft and Mueller, who also met with other government officials to "'map[] out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation.'" Pet. App. 9a (quoting Compl. ¶ 61). In those meetings, they "'discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings.'" *Ibid.* And they informed subordinate law-enforcement personnel that the detainees were suspected terrorists who "'needed to be encouraged in any way possible to cooperate.'" *Ibid.*

2. Confinement at the Metropolitan Detention Center: The point of Ashcroft and Mueller's policy was not lost on anyone: Many detainees—including respondents—were held in horrifying conditions for prolonged periods at the MDC in New York. They were kept in an especially harsh form of solitary confinement in the MDC's Administrative

Maximum Special Housing Unit—the ADMAX SHU. Pet. App. 10a. The detainees spent more than twenty-three hours per day in "'tiny cells.'" *Ibid.* (quoting Compl. ¶ 5). The cell lights were left on around the clock so the detainees couldn't sleep. *Ibid.* And at times, when inmates would fall asleep despite the lights, guards would make regular rounds to kick the cell doors, roust the detainees, and yell offensive comments at them. *Ibid.* The detainees were denied adequate clothing, and some were locked in freezing temperatures as punishment. *Id.* at 296a-298a, ¶¶ 122-27. They were denied access to basic necessities, such as eating utensils, hygiene products, and eyeglasses. *Id.* at 10a; 298a, ¶ 130. And they were denied access to the MDC inmate handbook, which would at least have explained how to file complaints about the maltreatment to which they were being subjected. *Id.* at 10a.

Detainees also suffered severe physical abuse at the MDC. On arrival, they were often slammed into or bounced off walls by the guards transporting them to the ADMAX SHU. J.A. 354-56. Some had their faces forcefully shoved into a wall with a blood-spattered American-flag T-shirt bearing the slogan "these colors don't run." *Id.* at 356-57. Detainees had their limbs or fingers twisted or bent by MDC staff. *Id.* at 367. Whenever the detainees were moved, they were shackled; and MDC staff sometimes lifted the detainees by the chains, inflicting physical pain. *Id.* at 370. And MDC guards hurt the detainees by stepping on their leg chains. *Id.* at 373. Two former MDC lieutenants have since frankly admitted that "some officers took their anger and frustration about the September 11 terrorist attacks out on the detainees." *Id.* at 380.

The abuse was not just physical but also spiritual: Respondents and other Arab Muslim detainees were subjected to ridicule and punishment aimed specifically at their faith and religious exercise. For example, soon after respondents arrived at the MDC, they requested copies of the Koran (Pet. App. 299a, ¶ 132), just as inmates of other faiths have the right to request and receive their holy scriptures. But under an official policy, some Muslim detainees were made to wait weeks for a Koran; others never received one at all. *Id.* at 11a. The detainees were denied access to Halal food. *Ibid.* Guards refused to tell the detainees the date, purposefully leaving the detainees unable to determine when Ramadan began. *Id.* at 299a-300a, ¶ 134. There were no clocks in the ADMAX SHU, and the guards refused to inform respondents of the time so that they could pray when required by their faith. *Id.* at 299a, ¶ 134. When respondents did pray, they were often interrupted by the guards, who banged on the cell doors, screamed derogatory remarks, told the detainees to "shut the fuck up," and generally mocked and verbally abused them. *Id.* at 300a, ¶ 136. Complaints of these and other abusive practices were brought to MDC management, including petitioner Hasty. *Id.* at 300a, ¶ 137. But the abuses continued nonetheless.

3. Respondents: There is no question that respondents had no involvement whatever in any terrorist activity. Pet. App. 2a. Instead, they were all arrested for being "'out-of-status' alien[s]," meaning that they had either entered the country illegally or overstayed their visas. *Ibid.* n.1. The only other trait that all the respondents shared is that they were, or were perceived or assumed to be, Arab Muslims.

ARGUMENT

This case stands at the intersection of religion, national origin, ethnicity, and race. The policy that petitioners instituted and enforced was one that singled people out for incredibly harsh treatment based on these protected characteristics. For that reason, this case fits squarely under the constitutional guarantee of equal protection of the laws.

Amici agree with respondents that petitioners violated clearly established equal-protection law. *Amici* write separately to explain why the case against qualified immunity here is even clearer than respondents and the Second Circuit suggest.

Petitioners marked respondents for arrest and detention and inflicted physical and psychological harms on them based on respondents' actual or assumed religious affiliation in conjunction with their national origin. Petitioners' conduct is thus at the heart of what this Court has long and consistently recognized to be prohibited by the Religion Clauses of the First Amendment; by doing precisely what these Clauses forbid, Petitioners violated clearly established law under both the Free Exercise Clause and the Establishment Clause.

The clarity of the Free Exercise and Establishment Clause violations here should necessarily inform the qualified-immunity analysis for respondents' equal-protection claims. Because the Religion Clauses of the First Amendment and the equal-protection component of the Due Process Clause all speak with one voice, announcing with ringing clarity that petitioners' conduct was indefensibly wrong,

the Court should consider the First Amendment violations in its qualified-immunity analysis.[2]

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[2] In addition to their equal-protection claims, respondents brought Free Exercise Clause claims based on the denials of access to the Koran and Halal food and the purposeful interruptions of prayer. The court of appeals summarily held, however, that there can be no *Bivens* action for free-exercise violations, based on the panel's view that this Court has definitively "'declined to extend *Bivens* to a claim sounding in the First Amendment.'" See Pet. App. 27a-28a (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)).

The court below misread this Court's precedents. In *Iqbal*, the Court "assume[d], without deciding," that a First Amendment claim *is* actionable under *Bivens*. 556 U.S. at 675. And in *Bush* v. *Lucas*, 462 U.S. 367, 388-90 (1983), the Court denied a *Bivens* remedy not because the plaintiff had brought a First Amendment claim but because the plaintiff had an alternative remedy available and hence did not need *Bivens* to seek relief. There is no similar alternative remedy here: "For people in [respondents'] shoes, it is damages or nothing." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

We note that if respondents had adequate access to counsel while in detention, they could have sued for violations of their First Amendment rights and obtained full injunctive relief. But because respondents were also denied their rights to counsel and to file grievances, they lost their ability to sue at all. If the Second Circuit's misguided view about the unavailability of *Bivens* actions for First Amendment violations goes uncorrected and this Court were to hold also that there is no *Bivens* remedy under the Fifth Amendment, the clear message to law enforcement and prison administrators will be: "If you want to commit flagrant violations of detainees' religious-freedom rights, just make sure that you also deprive them of access to counsel and the courts."

A. Petitioners' conduct violated the Religion Clauses of the First Amendment.

"[T]he First Amendment mandates governmental neutrality" with respect to religion, religious denominations, and beliefs about religion. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); accord, *e.g.*, *McCreary Cty., Ky.* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). The Religion Clauses serve as a bulwark against governmental overreach, protecting one of our most fundamental rights—the right to religious freedom. The Establishment and Free Exercise Clauses work in tandem to ensure that the government does not single out any religious group for official disfavor—much less for detention, abuse, and torture.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Thus, when the government designates one denomination for different treatment, whether favorable or unfavorable, its action is subject to strict scrutiny and cannot stand. *Id.* at 246. Simply put, "the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals." *McCreary*, 545 U.S. 875.

The Free Exercise Clause likewise mandates that the government must not single out a particular group for unfavorable treatment based on religion. Indeed, the Clause prohibits even "'subtle departures from neutrality.'" *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971)). That is because "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise

Clause.'" *Id.* at 532 (quoting *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986)). Unless the singling out of a religious group—a "religious gerrymander"—can meet the high bar of strict scrutiny, it violates the Free Exercise Clause (*id.* at 534, 546)—just as a denominational preference that fails to survive strict scrutiny violates the Establishment Clause (*Larson*, 456 U.S. at 246).

To determine whether a policy is forbidden religious discrimination, the Court first looks to the policy's language. If by its terms the policy identifies a particular religious group for regulatory control and punishment, then it is neither neutral nor generally applicable with respect to religion. And even if it is facially neutral, it cannot survive judicial scrutiny if in actual operation it singles out a religious group for punishment or coercion and does not apply equally to similarly situated persons of other faiths. See *Lukumi*, 508 U.S. at 534-38. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534; see also *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972).

Here, respondents straightforwardly alleged facts showing that petitioners' policies and practices disfavored Muslims (and those perceived to be Muslim) and that these policies and practices were neither neutral nor generally applicable because they explicitly applied solely to perceived Arab Muslims. See Pet. App. 252a, ¶ 1; see also Resp. Br. 3-6. And the policy's implementation treated one religious group—Muslims—as "of interest" to law enforcement (see Pet. App. 252a, ¶ 1), meaning that respondents and others were presumptively slated for detention and prolonged incarceration in the most harsh conditions and denied the ability to practice their faith

while confined solely because they were, or were perceived to be, of an officially disfavored religion and associated ethnicity. This treatment was dramatically different from what non-Muslims with similar immigration status could expect. See Pet. App. 266a-67a, ¶ 43. Petitioners deny none of that.

The policies and practices here would therefore have to satisfy "the most rigorous of scrutiny," meaning that petitioners would have to "advance 'interests of the highest order'" and show that their conduct was "narrowly tailored in pursuit of those interests"—*i.e.*, that the "interests could [not] be achieved by narrower [restrictions] that burdened religion to a * * * lesser degree." *Lukumi*, 508 U.S. at 546 (citing *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). The singling out of one group for disfavor and punishment on the basis of religion could survive strict scrutiny, if at all, "only in rare cases." *Id.* at 546.

This is not such a case. Though petitioners maintain that they were acting in furtherance of national security (see, *e.g.*, Hasty Br. 29; Ashcroft Br. 37-38), incanting the mantra of "national security" is not enough. To be sure, national security can be a compelling interest. "To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992); see also *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) ("we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose" if it is to survive strict scrutiny); cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) ("RFRA, and the strict scrutiny test it adopted, * * * require[] the Government to demon-

strate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant").

Otherwise, the government could always overcome strict scrutiny by the simple expedient of invoking a vague phrase that under some set of conditions might state a compelling governmental interest, be it "protecting voters from confusion and undue influence" (*Burson*, 504 U.S. at 199); "preserving the integrity of [the] election process" (*Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); "prison safety and security" (*Holt* v. *Hobbs*, 135 S. Ct. 853, 863 (2015)); preserving "public perception of judicial integrity" (*Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015)) or "public confidence in the fairness and integrity of the nation's elected judges" (*Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)); "ensuring that criminals do not profit from their crimes" or that "victims of crime are compensated by those who harm them" (*Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991)); "attaining a diverse student body" (*Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003)); "combating corruption" (*Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011)); "protecting the physical and psychological well-being of minors" (*Sable Commc'ns of Cal., Inc.* v. *F.C.C.*, 492 U.S. 115, 126 (1989)); "encouraging compromise and political stability" and preventing "splintered [political] parties and unrestrained factionalism" (*Storer* v. *Brown*, 415 U.S. 724, 729, 736 (1974)); "protection of children" (*Denver Area Educ. Telecomms. Consortium, Inc.* v. *F.C.C.*, 518 U.S. 727, 755 (1996)); "protecting * * * the appearance of confidentiality so essential to the effective operation of our foreign intelli-

gence service" (*Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)); or regulating "the practice of professions within [a State's] boundaries" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975))—not to mention the even more general and amorphous, but surely important, governmental interests in public health, safety, and, as asserted here, national security.

Here, the government's asserted interest in national security is not served by a policy of detaining people in solitary confinement and torturing them based on the fact that they are (or appear to be) Arab Muslims when there is not a whiff of evidence that they are a threat to anyone. Mass incarceration of people thought to be Arab Muslims would be grossly overinclusive to justify *any* detention, much less the extraordinarily harsh conditions of confinement here. And even if that were not so, the government's interest in preventing further acts of terrorism after 9/11 could surely have been "achieved by narrower [restrictions] that burdened religion to a far lesser degree" (*Lukumi*, 508 U.S. at 546) than a policy of keeping people confined in abusive conditions long after they have been cleared of any terrorist associations and petitioners have affirmatively determined them not to be a threat. Hence, strict scrutiny cannot be satisfied, and petitioners' conduct could not stand under the Establishment or Free Exercise Clauses.

B. Petitioners' duties and respondents' rights under the Religion Clauses were clearly established.

That petitioners were prohibited from singling out respondents for detention in abhorrent and abusive conditions—or at all—based on the fact that

they are Arab Muslims was clearly established under both the Free Exercise and Establishment Clauses in 2001, when the unconstitutional conduct occurred. *Larson* was decided in 1982; *Lukumi* was decided in 1993; and each specified constitutional prohibitions that this Court had already expressly recognized decades earlier. See, *e.g.*, *Epperson*, 393 U.S. at 104; *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("No person can be punished for * * * religious beliefs").

To put it plainly, any reasonable law-enforcement official—and even unreasonable ones—should have understood in 2001 that it is unconstitutional to round people up, incarcerate them, place them in solitary confinement, harass and abuse them, and deny them the ability to worship and practice their faith, even after determining that they are not a security threat, thereby treating the detainees radically differently from others with similar immigration status, all based on the detainees' adherence to a disfavored religion and associated ethnicity. As explained above, it is long and clearly settled that the Establishment Clause forbids singling out a religious group for disfavor and that the Free Exercise Clause forbids punishing based on religious affiliation or belief. See Section A, *supra*.

Notably, petitioners do not deny that their policies and practices targeted Arab Muslims because they were Arab Muslims. Petitioners do not explain how their expansive program of abusing Muslims genuinely served any legitimate governmental interest, much less a compelling one. And petitioners do not show that their actions were narrowly tailored to the objectives that they say they were pursuing. Instead, they argue that their misdeeds occurred under unusual circumstances and therefore that the par-

ticular rights of respondents that they trammeled could not have been clearly established.

But this Court has expressly recognized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). For a right to be clearly established, it is necessary only that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right"; the "very action in question" need not have "previously been held unlawful" as long as, "in the light of pre-existing law[,] the unlawfulness [was] apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Here, it certainly was, for the reasons already explained.

Petitioners Ashcroft, Mueller, and Ziglar also contend that because respondents had committed immigration violations, they were lawfully arrested; and because there were legitimate national-security concerns about terrorism after the 9/11 attacks, there was no clearly established prohibition against detaining in conditions of torture people who have overstayed their visas, based on their religion and associated ethnicity, even after petitioners knew that "the government lacked information" connecting them to terrorism. Ashcroft Br. 37-38; see also Ziglar Br. 22. Those arguments boil down to this: It was not clearly illegal, petitioners contend, to hold respondents in the extraordinarily abusive conditions of solitary confinement here based on their perceived religion and national origin.

Nonsense. The assertion that perceived Arab Muslims were an inherent threat to national security solely by virtue of their religion and associated ethnicity was inadequate to justify detention even be-

fore respondents were determined to be utterly innocent of terrorism; for the period after that determination, petitioners' argument is beyond fanciful. Months of solitary confinement based on perceived religion and national origin are not rendered lawful, or understandable, or excusable just because a genuine infraction was available as a pretext for the initial arrest. Nor does the talismanic invocation of "national security" trump all constitutional requirements that government not mete out punishment for membership in a disfavored religious group. Denominational preferences and religious discrimination by government officials are concretely, straightforwardly, unequivocally unconstitutional—and were so long before 2001.

Petitioners Hasty and Sherman fare no better with their arguments. They invoke *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), for the proposition that any post-9/11 response "detain[ing] individuals because of their suspected link to terrorism would produce a disparate, incidental impact on Arab Muslims." Br. 39. And hence, petitioners argue, detaining Arab Muslims was lawful, or at least not clearly established to be unlawful. *Ibid.*

But respondents were not held because they had a suspected link to terrorism. And respondents' faith and associated national origin were not incidental to reasonable suspicions that respondents were terrorists. Those characteristics, without any evidence of terrorist affiliations or connections whatever, were instead the *cause* of the maltreatment by petitioners. And that maltreatment continued even well after respondents were cleared of any terrorist connections. In other words, petitioners continued to detain respondents in extreme, abusive conditions after peti-

tioners absolutely knew that they had no cause—legally justified or otherwise. Pet. App. 259a-60a, ¶¶ 24, 26. Petitioners had not even a fig-leaf of cover for their brute-force religious discrimination and oppression. And that, the Religion Clauses clearly forbade.

C. Violations of the Religion Clauses are properly considered in determining qualified immunity from respondents' equal-protection claims.

Petitioners' violations of clearly established First Amendment law are highly pertinent and should be considered by this Court in determining whether there is qualified immunity from respondents' equal-protection claims because the Religion Clauses and the equal-protection component of the Due Process Clause speak here with one voice. Accordingly, it is not only natural and logical to consider the settled law under the three Clauses together, but to do otherwise would create doctrinal confusion—while also disserving the aims and objectives of qualified immunity.

When analyzing a qualified-immunity defense, courts generally look to whether there is a clearly established duty under "the federal right on which the claim for relief is based." *Elder* v. *Holloway*, 510 U.S 510, 515 (1994). That is because allowing plaintiffs to bootstrap their federal claims on random, unrelated legal authority to overcome qualified immunity might make the qualified-immunity determination turn on, for example, "the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment." *Davis* v. *Sherer*, 468 U.S. 183, 195 (1984). "It would [then] become more difficult * * *

for officials to anticipate the possible legal consequences of their conduct" given the "plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." *Id.* at 196 (footnote and citation omitted). That would defeat the central purpose of the qualified-immunity doctrine: ensuring that "officials can act without fear of harassing litigation" by allowing suits for damages to go forward "only if [the officials] reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Id.* at 195.

This Court has also recognized, however, that looking to other provisions of clearly established law is appropriate when those provisions are intertwined with or inform the federal right under which the particular legal claim has been alleged. Thus, for example, the Court recognized in *Davis* that "[s]tate law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law." 468 U.S. at 193 n.11 (citing *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972)). In that circumstance, determining whether there are clearly established due-process rights involves also determining whether there are clearly established state-law rights, so both bodies of law are to be considered.

Similarly, when a constitutional provision has been incorporated against the states by the Fourteenth Amendment, the Court looks to the clearly established law of the incorporated amendment, not just to decisions expounding and applying the Fourteenth Amendment *per se*. See, *e.g.*, *Chavez* v. *Martinez*, 538 U.S. 760, 766-67 (2003). The Court also re-

lies on cases specifying due-process law in the qualified-immunity analysis without regard to whether the particular legal claim at hand is brought under the same Amendment—the Fifth or the Fourteenth—as were the cases expounding the established law to which the Court looks for guidance. See, *e.g.*, *Davis*, 468 U.S. at 202. And the Court has looked even to state regulations and a federal administrative agency's report to determine that there was no qualified immunity for an alleged Eighth Amendment violation when reasonable officials would have had "fair warning" from those materials that their conduct was unconstitutional. *Hope*, 536 U.S. at 743-44.

The Court should do the same here, because "the Free Exercise Clause, the Establishment Clause, * * * and the Equal Protection Clause as applied to religion[ ]all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment).[3]

In prohibiting invidious distinctions based on religion, "the Establishment Clause mirrors the Equal Protection Clause." *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment). And the fundamental "right to equal protection of the laws" to exercise one's freedom of religion is protected by both

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[3] Although *Grumet* was decided under the Equal Protection Clause of the Fourteenth Amendment, "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

"the First and Fourteenth Amendments." *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951).

In short, the First Amendment caselaw "bears upon" and necessarily informs "the claim of constitutional right" (see *Davis*, 468 U.S. at 193) asserted here under the equal-protection component of the Due Process Clause because the substantive right at issue is functionally the same under all the Clauses. And hence, the Court should not hesitate to look to clearly established First Amendment law to analyze petitioners' qualified-immunity defense.

To do otherwise—to ignore clearly established First Amendment law that cannot be disentangled from the correlative equal-protection law—would give rise to doctrinal confusion that would not only undermine the substantive constitutional rights at issue, but also run directly counter to the objectives of the qualified-immunity doctrine. If courts were forbidden to look to First Amendment law when official religious discrimination and religiously based oppression is challenged by means of an equal-protection claim, then the courts may come to entirely different conclusions about whether a specific act is illegal under constitutional provisions that are supposed to point exactly the same way.

This case shows that problem in spades. Petitioners designated huge numbers of people for prolonged detention, abuse, and denial of the right to practice their faith, based on religious affiliation and national origin—two protected characteristics that are closely related for the detainees (indeed, that close connection is precisely why petitioners focused on these characteristics). If the courts were required to don constitutional blinders and decide the qualified-immunity question for claims stated under the

Fifth Amendment without reference to the extensive and long-standing body of caselaw under the First Amendment, then a court might, for example, decide that while there is no qualified immunity for claims of maltreatment on the basis of religion because those claims happen to have been brought under the Religion Clauses, there *is* qualified immunity for claims of the very same maltreatment on the basis of religion and national origin because the injured parties had concluded, reasonably, that the addition of national-origin discrimination made their constellation of claims fit naturally under equal protection.

That nonsensical approach to qualified immunity, if adopted, might also lead the lower courts to conclude, at the merits stage, that they must view the substantive law concerning invidious discrimination and official abuse and oppression on the basis of religion entirely differently depending on whether a claim happens to be brought under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause of the Fourteenth Amendment, or the equal-protection component of the Due Process Clause. The courts might then reason that the legal authority that happens to have been issued under one of the Clauses cannot be considered in analyzing the merits of the claims under the other Clauses. Thus, far from properly recognizing that the Clauses "mirror[ ]" each other in the protections that they provide (*Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment)), the courts might understandably conclude that this Court has mandated that they consider and develop the doctrine independently, even when doing so produces absurdly contradictory results.

Nor would artificial segregation of the intertwined specifications of the constitutional rights further the aims of the qualified-immunity doctrine. That doctrine encourages government agents to carry out their official duties vigorously by removing the constant fear of liability for damages while at the same time recognizing the need to hold those officials accountable and to provide remedies for gross violations of citizens' fundamental rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Although government agents ought not face unexpected risks of personal liability that cause "undue interference" with the performance of their duties, there must still also be a "damages remedy to protect the rights of citizens." *Id.* at 806-07. The point of qualified immunity, after all, is "to safeguard government, and thereby to protect the public at large, not to benefit [the government's] agents." *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992).

Qualified immunity is meant to prevent overdeterrence of official conduct by those who act on a good-faith but ultimately incorrect understanding of the law. It was never intended to license extraordinarily obvious and wholly indefensible constitutional violations by insulating government agents, like petitioners here, from the consequences of their actions. That the officials' gross misdeeds violate multiple overlapping constitutional duties is strong reason that there *should* be liability; it is not justification for *denying* any possibility of liability from the get-go.

* * *

Petitioners were the architects and drivers of a policy that resulted in respondents' being held for months in abject and inhumane conditions because

respondents were Arab Muslims. Respondents were treated as guilty of heinous acts of terrorism until proven innocent and were treated worse than the Constitution allows even for those who have actually been prosecuted and found guilty. And when it was clear to petitioners that respondents had no connections at all to terrorism, petitioners *still* held respondents in solitary confinement—for months. As for the excuse that respondents had committed immigration violations, similarly situated people of different faiths and ethnicities received entirely different treatment for those very same immigration infractions. Petitioners' actions were unreasonable, unjust, and un-American. Any reasonable officer would have understood as much. The Court should allow respondents to prove their case and hold petitioners accountable for their actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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